Supreme Court, U.S.
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(1)

No. _____

IN THE

Supreme Court of the United States

ELLIOT S. SAFFRAN,
Petitioner,

v.

NOVASTAR MORTGAGE, INC.,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

# PETITION FOR A WRIT OF CERTIORARI

Elliot S. Saffran
Pro Se
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August 24, 2009

Petitioner

## QUESTIONS PRESENTED

1. What circumstances render a civil case, or issues arising therein, moot so as to preclude the Supreme Courts consideration of their merits?

2. Does fraudulent conveyance, under section 548 and 549 U.S.C. command that fair equivalent value be obtained before the foreclosure sale will be left undisturbed by the bankruptcy court?

3. Does the automatic stay protection for a secured debt justify continuation of the automatic stay for a debtor, when there is equity in the subject property?

4. Does an erroneous order of a bankruptcy court granting relief from stay void, or invalidate a subsequent foreclosure sale?

5. If a debtor has the right under state law to void, and invalidate and set aside a foreclosure sale after the sale has taken place, and after deeds have been recorded, then does petitioner have the [r]ight in bankruptcy to do the same; and that right is [property of the estate]? [Bankruptcy Code, 11 U.S.C.S. § 541(a)(1)].

## PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE

The parties to the proceeding below are identified in the caption of the case.

Petitioner Elliot S. Saffran has no parent corporation and no publicly held corporation has a 10% or greater ownership interest.

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## OPINIONS BELOW

The judgment of the court of appeals is found in (Pet. App. 1a ). The district court's order re: motion for stay pending appeal is available electronically at 2007 U. S. Dist. LEXIS 96306.

## JURISDICTION

Petitioner seeks review of a final decision of the court of appeals entered on May 28, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the power of vacatur, 28 U.S.C. § 2106, and bankruptcy code.

## STATEMENT OF THE CASE

Petitioner seeks review of the First Circuit's decision affirming the dismissal of his appeal. Mr. Elliot Saffran filed for Chapter 13 bankruptcy protection on April 23, 2007, in the United States bankruptcy court for the District of Massachusetts. Novastar Mortgage, Inc. filed a motion for relief from the automatic stay.

The bankruptcy court entered an erroneous order that granted Novastar's motion for relief from the automatic stay on July 24, 2007.

Shortly after Novastar was granted [relief from stay] Novastar rescheduled the foreclosure sale and this time identified MERS as the holder of the mortgage in the notices and publications related to the rescheduling of the foreclosure sale. However, the foreclosure sale was canceled by Novastar's counsel. Novastar's counsel now stated in the court below and various documents submitted to the United States District court that the foreclosure notices done in the name of MERS, and not Novastar Mortgage, Inc. were in [e]rror.

The foreclosure sale is void as a matter of law.

## REASONS FOR GRANTING THE PETITION

Review of the Petition is warranted by this Court for compelling reasons:

(1) Federal and state courts have issued conflicting decisions on issues of law, and constitutional interpretation.

(2) This case presents an important question of federal law that should be resolved by the Supreme Court.

(3) The legal issues raised have recurred frequently in the lower courts.

(4) The issues raise significant economic and public policy issues of the foreclosure crisis around the nation.

## STANDARD OF REVIEW

*In re SPM Mfg. Corp., 984 F.2d 1305, 1310-11 (*1st Cir. 1993) (citations omitted). [N]o special deference is owed to the district court's determinations. Id. at 1311.If effective relief can be granted, then this appeal is not moot. The petitioner respectfully requests that the Court exercise its power under 28 U.S.C. section 2106 to vacate judgment of the court of appeals.

The foreclosure sale does not render the appeal moot, since a reversal would allow the Appellant to seek either a money judgment, or the subject property seized in the foreclosure sale.

There are situations in which failure to obtain a [stay] will not render an appeal moot, where state law would otherwise permit the transaction to be invalid and void. *See Rosner, 811 F.2d at 1228 (*9th Cir.). Bon v. Graves, 216 Mass. 440, 103 N.E. 1023 1914).

## INVALID FORECLOSURE

Under Massachusetts law, a foreclosing mortgagee must do more than comply with the procedure prescribed by statute. "It has been repeatedly held in this Commonwealth, and

elsewhere, that a mortgagee who attempts to execute a power of sale contained in a mortgage is bound to exercise [g]ood faith, and to use reasonable diligence to protect the
rights and interests of the mortgagor under the contract.....It is his duty, for the benefit of the mortgagor whom he represents, so to act in the execution of he power as to obtain for the property as large a price as possible." Clark v. Simmons, 150 Mass.357, 359, 23 N.E. 108,108 (1890).

A disparity between the foreclosure sales price and fair market value is not sufficient of itself to invalidate a foreclosure, but such disparity plus other circumstances can be. Sher v. South Shore Nat'l Bank, 360 Mass. 400, 274 N.E. 2d 792 (1971), Manoog v. Miele, 350 Mass. 204, 213 N.E. 2d 917 (1966), West Roxbury Savings Co-op Bank v.Bowser.

By not providing adequacy of notice, advertising, and marketing of the subject property Saffran argues that Novastar Mortgage, Inc., and their foreclosure attorney Orlans Moran PLLC violated its fiduciary duties under Massachusetts law by publishing once each week, for three weeks, a small notice, phrased in legalese, in a local newspaper. Only basic information about the property contained in the statutory notice is a metes and bounds description of the land area. Id. This is hardly a paradigm of good faith marketing technique and a diligent effort to protect the interest of Mr. Saffran, Public Auction.

[B]eyond compliance with statutory terms, a mortgagee also owes a duty to the mortgagor. "In executing the power of sale, the [mortgagee], in addition to a literal compliance with the power of sale, [is] bound to exercise good faith and to put forth reasonable diligence to protect the interest of the mortgagor," Atlas Mortgage Co. v. Tebaldi, 304 Mass. 554, 24 N.E.2d 554,557 (1939). A mortgagee ordinarily is not required...to give notice of a foreclosure sale other than by publication, but failure to give further notice, and market the property is evidence that good faith was not used to obtain the best reasonable price, as is the case in Saffran's foreclosure, satisfies the requirement for setting aside the foreclosure sale. There were no bidders because of the mortgagee's bad faith to give further notice, other than Novastar at the public auction, and the property at 26 Debbie Lane was sold $158,000 dollars under the fair market value. In fact the subject property was [f]raudulently sold to Novastar for a sale price of only $340,000.

The Supreme Judicial Court of Massachusetts has on several occasions voided a foreclosure sale when sufficient circumstances were present. For example, in Bon v. Graves, 216 Mass. 440, 1030 N.E. 1023 (1914), the mortgagee chose to place the required legal notices in a newspaper which had a more limited circulation than other local newspapers.

**Error of Law of the United States District court District of Massachusetts**

Mr. Saffran argues that the United States District court for the District of Massachusetts *erred* when the court determined that the bankruptcy court granted relief from stay for property located at [23] Debbie Lane, that is not owned by Saffran, and Novastar has no financial interest in property located at 23 Debbie Lane, Milford, MA.

The district court did not have the authority not to follow *Fed. R .Civ. P. 60(a).*" In essence the court stated, "the Court has determined that this was a typographical error on the part of the bankruptcy bourt and does not affect the validity of the order.'

The district court's improper ruling, and order dated October 18, 2007), is wrong as a matter of law, for the following reason – there was [NO} leave granted by the United States District court [appellate court] to have the bankruptcy court correct their error. *See Fed.R.Civ.P. 60(a)* below that states:

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. [D]uring the pendency of an appeal, such mistakes may be corrected before the appeal is

docketed, and [t]hereafter while the appeal is pending may be so corrected with leave of the appellate court.

Moreover, this renders the bankruptcy order granting relief from stay [i]nvalid because their was never a leave of court granted after the appeal was docketed, as set forth in the Federal Rules of Civil Procedure Rule 60(a). The ruling that "the court has [d]etermined that this was a typographical error on the part of the bankruptcy court and does not affect the validity of the order," is just plain wrong.

Pursuant to 11 U.S.C. § 362(d), relief from the automatic stay may be granted "for cause". The cause listed in the statute is not [e]xclusive. While a post-petition default may constitute cause, the existence of an equity cushion is countervailing cause to continue the stay. In the Saffran case an equity cushion existed.

The issues on a motion from relief from stay are established. In Grella v. Salem Five Cents Savings Bank, 42 F. 3d 26 (1st Cir. 1994), the First Circuit held that the purpose of the hearing is to determine whether the moving party has established a colorable right to possession of its collateral. The first Circuit also made it [c]ear that bankruptcy courts are authorized to consider counterclaims and affirmative defenses.

This is not to say that the bankruptcy courts never *consider* counterclaims and defenses, including preference counterclaims, during a relief from stay hearing. As several bankruptcy courts have discussed, there is significant difference between mere consideration of claims and final adjudication

on the merits. *See* In re Pappas, 55 B. R. at 600; In re Gellert, 55 B.R. at 974-75; In re Tally Well, 45 B. R. at 152. [c]ertainly, a court may take into account any matter that bears directly on the debtor's equity, [o]r that [c]learly refutes a creditor's claim to the property. If the stay is not lifted, that creditor is not barred forever from seeking payment.

The bankruptcy court also erred because there is equity in the subject property, based on $498K value.. "When there is still equity in the collateral, courts are [n]ot inclined to lift the automatic stay." In re Nichols, 440 F.3d 850 (6th Cir. 2006). This rule is [f]ollowed in the First Circuit. Baybank-Middlsex v. Ralar Distributors, Inc., 69 F.3d 1200 (1st Cir. 1995).

Decisions by other circuits and state courts which uniformly hold that the foreclosure plaintiffs must have standing and that subject-matter-jurisdiction requirements are met at the time the complaint for [relief from stay] is filed. Even without the concerns raised by the documents that NovaStar Mortgage, Inc. has filed, there is reason to question the existence of standing and jurisdictional authority. *See* Katherine M. Porter. Misbehavior and Mistake in Bankruptcy Mortgage Claims 3-4 (November, University of Iowa College of Law Legal Studies Research Paper Series available at SSRN:http://ssrn.com/abstract-1027961 ("[H]ome mortgage lenders often disobey the law and overreach in calculating the mortgage obligations of consumers....Many of the overcharges and unreliable calculations...raise spector of poor recordkeeping, failure to comply with consumer protection laws, and massive, consistant overcharging." Id at 654.

*In re Foreclosure Cases*, 2007 WL 3232430 (N.D. Ohio, Oct. 31, 2007) and *In re Foreclosure Actions*, 2007 WL 4034554 (N.D. Ohio, Nov.14, 2007) (collectively, the "Northern District Foreclosure Cases"). The court in both cases dismissed complaints to foreclose on mortgages because the plaintiff lender failed to submit to the court a copy of the assignment of the mortgage evidencing the plaintiff's status as mortgagee under the mortgage.

The Northern District Foreclosure Cases and subsequent cases have caused waves not just in Ohio. We are beginning to see the ripple effects in other jurisdictions. Such effects are evident in *re Noseks, 2008* WL 1899845 (Bkrtcy. D. Mass., Apr. 25, 2008.

Moreover, an appellate court found that the trial court should have denied summary judgment because a genuine issue of material fact existed as to whether of not the plaintiff lender was the real party in interest since there was no evidence on the record of assignment. See *Everhome Mtge. Co. v. Rowland*, 2008 WL 747698. The court found that it could not consider a lender plaintiff's evidence introduced on appeal of an assignment post-filing of the foreclosure complaint in order to establish that the lender was the holder of the mortgage <u>because</u> a reviewing court [c]annot add matter to the record before it which was not part of the trial court's proceedings.

Under Massachusetts law, foreclosure of a mortgage usually is accomplished by a power of sale granted in the mortgage. *See* G.L. c. 244 § 1 *et seq.*, foreclosure under power of sale is governed by section 14 of Chapter 244.

When Novastar Mortgage, Inc.[respondent] assigned the mortgage to MERS, it lost the contractual right and standing as the mortgagee, to file its motion for relief from stay in its own name, since it was no longer the "mortgagee" within the meaning of the mortgage. The bankruptcy court lacked subject matter jurisdiction and or authority to grant Novastar Mortgage, Inc. motion for relief from stay.

Standing is a constitutional issue since it impacts the court's subject matter jurisdiction. Only the real party in interest has standing to seek relief from the court. *See* In re Comcoach Corp., 689 F2d 571 (2nd cir. 1983)

As noted above, the question of standing implicates the court's subject matter jurisdiction. Donahue v. City of Boston, 304 F.3d 110 (1st. Cir 2002); *see* Zurich Insurance Company, *supra.* Accordingly, the court must resolve jurisdictional questions before reaching the merits. An objection to subject matter jurisdiction is not waivable and may be raised at any time, even on appeal. Barrett ex rel. Estate of Barrett v. U.S., 462 F.3d 28 (1st Cir. 2006). Defective standing also cannot be cured by substitution of the real party in interest. Zurich

Insurance Company, v. Logitrans, Incorporated, et al., 297 F.3d 528 (6th Cir. 2002).

Because Novastar Mortgage, Inc. was not the holder and mortgagee, it lacked standing to bring the motion for relief from stay, and the bankruptcy court lacked subject matter jurisdiction. If Mortgage Electronic Registration Systems, Inc. is the alleged foreclosing entity, then it is MERS that needed the relief from bankruptcy court. Accordingly, the lower court must be reversed.

The court below, however, upheld the scheme pursuant to a series of rulings that are contrary to precedent, and, at a minimum, raise such serious constitutional and public policy questions that the Supreme Court should resolve directly.

**The Opinion Below Commits Other Legal Errors**

If a debtor has the right under state law to invalidate and set aside a foreclosure sale after the sale has taken place, and after deeds have been recorded, then it has the [r]ight in bankruptcy to do the same, and that right is [property of the estate]. Bankruptcy Code, 11 U.S.C.S. § 541(a)(1).

Moreover, under Massachusetts law, inadequacy of price coupled with bad faith, unfairness or irregularity is a sufficient basis for setting the sale aside and for the court to invalidate the foreclosure on the subject property located at [26] Debbie Lane Milford, MA 01757, see Edry et al v. R.I. Hospital Trust Nat'l Bank citing (In re: Edry), 1996

WL 622574 (Bankr. D. Mass. 1996), invalidated a foreclosure in Edry requires "mortgagee must do more than comply with the procedure prescribed by the statute."

In the case at bar, Novastar, the alleged mortgagee failed to act in [g]ood faith or to use reasonable diligence in conducting the foreclosure sale. Moreover, NovaStar only minimally complied with the statutory requirements, and the mortgagee engaged in no marketing, no real estate broker contact, no appraisal, no inquiry into the market regarding value or prospective buyers, and no inspection effort. Furthermore, the sale price was substantially less than the $498K fair market value, in fact NovaStar was the only bidder, and offered a meager $340K; $158K less than the fair market value. Finally, NovaStar failed to respond to the debtor's requests to resolve any alleged delinquency.

Novastar Mortgage, Inc. failed to act in good faith for numerous reasons, including but not limited to, not using reasonable diligence and good faith in conducting the foreclosure sale of the subject property at [26] Debbie Lane, Milford, Massachusetts, because the mortgagee did not engage in marketing the property, obtain an appraisal, contact real estate brokers, inquire into the market regarding [e]ither value or [p]rospective buyers, inspect the property, or publish sufficient newspaper notice beyond minimum statutory notice. Moreover, the failure of a mortgagee to use good faith and reasonable diligence in executing a foreclosure sale will result in the invalidation of the sale. See see Edry et al v. R.I._Hospital Trust Nat'l Bank citing (In

re: Edry), 1996 WL 622574 (Bankr. D. Mass. 1996). Also see Krassin v. Moskowittz, 275 Mass. 80, 175 N. E. 269 (Mass. 1931).

In Massachusetts, and other states it is basic that a mortgagee attempting to execute a power of sale contained in a mortgage must exercise good faith, and use reasonable diligence to protect the interests of the mortgagor. [f]ailure in this respect, as in the actions taken by Novastar Mortgage, Inc. will invalidate the sale withstanding a bare literal compliance with the terms of the power, *see Drinan v. Nichols, 115 Mass. 353, 357., Clark v. Simmons, 150 Mass. 357, 359, 23 N.E. 108., Levy v. Higginson, 266 Mass. 381, 385, 165 N.E. 492., Kavolsky v. Kaufman, 273 Mass. 418,173 N.E. 499.*

Fraudulent conveyance, under section 548 and 549 U.S.C. commands that present fair equivalent value must be obtained before the foreclosure sale will be left undisturbed by the bankruptcy court.

The duty of a mortgagee foreclosing on real estate is governed primarily by adherence to the statutory requirements found in Mass, Gen. Laws ch. 244, sections 11-17B. This statutory framework includes minimum publication and notice requirements. In addition to compliance with the statute, however, the mortgagee must also act in [good faith] and use reasonable diligence in conducting the sale or the sale will be [i]nvalidated as in Edry v. R.I. Hospital Trust Nat'l Bank citing (In re Edry), 1996, 1996 WL 622574 (Bankr. D. Mass. 1996), invalidated a foreclosure in Edry requires "mortgagee must do more than comply with the

procedure prescribed by the statute." Also see Krassin v. Moskowittz, 275 Mass. 80, 175 N. E. 269 (Mass. 1931).

**Federal Rules of Civil Procedure**

**F.R.C.P Rule 60 Relief from Judgment or Order**

Fed. R. Civ. P. 60(a) Clerical Mistakes .....Pet. App. 2a

Fed. R. Civ. P. 60(b)(6) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. ..... ... Pet. App. 2a

## CONCLUSION

For all of the aforementioned reasons, the petition for a writ of certiorari should be granted.

Moreover, petitioner respectfully requests that the Court exercise its power under 28 U.S.C. § 2106 (Pet. App. 3a) to vacate judgment of the court of appeals.

August 24, 2009

Respectfully submitted,
/s/ Elliot S. Saffran

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# APPENDIX

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**United States Court of Appeals**
**For the First Circuit**
**(entered May 28, 2009)**

**No. 08-1654**

**Elliot S. Saffran, Appellant**

**v.**

**NovaStar Mortgage, Inc.**

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**Before**

Lynch, Chief Judge,
Lipez and Howard, Circuit Judges.

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**JUDGMENT**
**Entered: May 28, 2009**

Elliot S. Saffran appeals from the district court's denial of a motion filed under Fed. R. Civ. P. 60(b)(6) seeking to vacate the dismissal of his appeal from an order entered in a bankruptcy proceeding. Motions filed under Rule 60(b)(6) are granted only where exceptional circumstances justifying extraodinary relief exist. Ahmed v. Rosenblatt, 118 F.3d 886, 891 (1st Cir. 1997). The District court did not abuse its discretion in concluding that Saffran had failed to make a showing that such circumstances existed. See id.

Affirmed. By the Court

/s/ Richard Cushing Donovan, Clerk

Fed.R. Civ.P. 60(a) Clerical Mistakes

Rule 60(a) **Clerical mistakes**- in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any part and after such notice, if any, as the court orders.

During the pendency of an appeal, such mistakes ma be so corrected [[before]] the appeal is docketed in the appellate court , and thereafter while the appeal is pending may be so corrected with [[leave]] of the appellate court.

Rule 60(b)(6) **Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.** – On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons:
60(b)(6) [any other reason justifying relief from the operation of the judgment]

The statute that supplies the power of vacatur provides:

28 U.S.C. § 2106 –

"The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

Note: Article III does not prescribe paralysis on the Supreme Court. "If a judgment has become moot, this Court may not consider its merits, but may make such disposition on the whole case as justice may require." Walling v. Reuter Co., 321 U.S. 671,677, 64 S.Ct. 826, 829, 88 L. Ed. 1001 (1944).